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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/776,311	02/11/2004	Anthony J. Kinney	BB1538USNA	4023

23906 7590 04/03/2007
E I DU PONT DE NEMOURS AND COMPANY
LEGAL PATENT RECORDS CENTER
BARLEY MILL PLAZA 25/1128
4417 LANCASTER PIKE
WILMINGTON, DE 19805

EXAMINER

FOX, DAVID T

ART UNIT	PAPER NUMBER
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1638

MAIL DATE	DELIVERY MODE
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04/03/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/776,311	Applicant(s) KINNEY ET AL.	
	Examiner David T. Fox	Art Unit 1638	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 March 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 23 March 2007. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☒ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☒ Applicant's reply has overcome the following rejection(s): see attachment.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 1,11,12,16-18 and 26-28.
 Claim(s) withdrawn from consideration: 21-25 and 140.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☒ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attachment.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
 13. ☒ Other: see attachment.

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Attachment to Advisory Action, Item 3

Failure to simplify: both 112 first paragraph rejections remain.

Item 4.

Improper claim status identifier ("previously amended" versus ---previously presented---) in claims 1, 11, 26-27. Indication of current amendment where none existed in claims 21 and 28. Failure to underline newly added material in claim 12 ("docosahexaenoic acid"), and misspelling of original claim term ("EOPA" versus ---EPA---).

Item 5.

If entered, the amendment of 23 March 2007 would have overcome 101 rejection of claims 16-18, and objections to claims re use of abbreviations without explanations.

Items 10-11.

Request for reconsideration depends upon Kinney declaration of 23 March 2007 and appended references. This declaration is not persuasive because it remains unclear whether the references cited utilized the techniques and constructs taught in the specification. It appears that the references support the Examiner's position re unpredictability, specifically regarding the suitability of particular plant species for the claimed high (above 1%) levels of long-chain fatty acids, particularly for DHA, in contrast to the claim breadth reciting any oilseed plant species. See Wu et al (2005) page 1014, column 1, second full paragraph and page 1015, column 1, second full paragraph. See also Damude et al (2007), fourth page, column 2, first full paragraph and fifth page, column 1, second full paragraph. See also Napier et al (2006), page

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401, column 1, first full paragraph and column 2, top paragraph and bottom paragraph; and page 403, column 1, last sentence and column 2, top paragraph and first sentence of second paragraph.

The art cited by Applicant also supports the Examiner's position that the particular combination of enzymes (and genes encoding them) utilized by Applicant was essential for the production of the claimed high levels of long chain fatty acids. See Damude et al, fifth page, column 1, third full paragraph. See also Napier et al, page 402, column 2, bottom paragraph.

The art cited by Applicant also appears to indicate that particular new genes or enzymes were required for the obtention of high levels of long-chain fatty acids in a variety of non-exemplified oilseed plant species, which genes or enzymes were not taught or contemplated by the instant specification. See Napier et al, page 400, column 2, bottom paragraph, penultimate sentence. See also Wu et al, page 1013, column 2, bottom paragraph; page 1014, column 1, second full paragraph. See also Damude et al, fourth page, column 2, second full paragraph, penultimate sentence

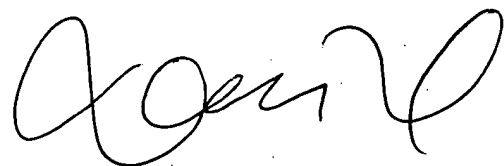
Regarding the statements on page 2 of the Kinney declaration, penultimate paragraph, it is noted that none of the claims are limited even to the presence of the very broad class of desaturase and elongase genes. It is also noted that this discussion does not refer to the third type of long-chain fatty acid which is claimed, namely DPA. It is also noted that most of the claims are not even limited to any particular long-chain fatty acid (claims 1, 16 and 26), or even to particular omega-3 fatty acids (claims 11, 17 and 27).

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Item 13.

The IDS of 23 March 2007 was not submitted in a format which permitted its conversion to Adobe Acrobat format, which conversion is required for Examiner validation of the IDS.

DAVID T. FOX
PRIMARY EXAMINER
GROUP 180 1638

A handwritten signature in black ink, appearing to read 'David T. Fox', is written below the printed name and title.